Nos. 82-1326 and 82-1327

IN THE

Supreme Court of the United States

October Term, 1982

JAMES G. WATT, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented.

Whether the lower courts properly determined that Outer Continental Shelf Lease Sale 53, which established the basic scope and chapter for subsequent oil and gas development in an area adjacent to the California coastal zone, is a federal activity "directly affecting" that zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when that determination was supported by the purposes and legislative history, of that provision and its longstanding interpretation by the federal agency charged with administering the Act.

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Statement of the Case.

This case involves the question of whether a federal oil and gas lease sale on the Outer Continental Shelf (OCS), Lease Sale 53, "directly affects" California's coastal zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. §§ 1451, *et seq.*, thereby triggering the requirement of that section that the Department of the Interior conduct a consistency determination to ensure that the lease sale is consistent, to the maximum extent practicable, with the terms of the California Coastal Management Program.[1]

In order to appreciate the significance of this issue, it is important to understand the genesis of that management program. Under the provisions of § 306 of the CZMA, 16 U.S.C. § 1455, states are encouraged to prepare coastal management programs and submit such programs to the Secretary of Commerce for federal approval.[2] Through these programs, coastal states are to provide for comprehensive management of their coastal zones, making provision for protection of important resources and for sound and orderly development along their coasts. Congress' aim in enacting

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[1]Respondents file this single brief in opposition to the petitions in both Nos. 82-1326 and 82-1327. The respondents on whose behalf this brief is filed include all of the parties plaintiff identified in DOI Pet. at (I), with the exception of the City and County of San Francisco and the Counties of Santa Clara and San Diego. For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Petition for a Writ of Certiorari of the Secretary of the Interior, *et al.*, are cited as "DOI Pet. at ____." All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at ____a." References to the petition of the Western Oil and Gas Association, *et al.*, are cited as "WOGA Pet. at ____." Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, *e.g.*, "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23."

[2]Section 306 provides for federal funding to assist states in developing and administering coastal programs and sets forth a number of requirements and findings necessary for their approval by the Secretary of Commerce. Other than this federal funding, the provision of consistency review is the only incentive for a state to develop a coastal management program.

the CZMA was to protect the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). Congress found that development of the nation's coastal zone, including "extraction of . . . fossil fuels," was causing the loss of biological resources, open space, and the fragile shoreline itself. 16 U.S.C. § 1451(c), (d), (e).

Congress thus perceived a need to resolve the serious conflicts among important, competing uses of coastal resources and chose comprehensive state coastal management programs as the proper vehicle to resolve these conflicts:

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone. . . .

16 U.S.C. § 1451(i). To promote the creation of state programs and to ensure the comprehensive coastal management authority of the participant states, Congress provided that, once a state management program is approved by the Secretary of Commerce, all federal agencies must conduct their activities "directly affecting" the state's coastal zone in a manner that is, to the maximum extent practicable, consistent with the state's approved program. CZMA § 307(c)(1), 16 U.S.C. § 1456(c)(1).

In November 1977, the Secretary of Commerce approved the California Coastal Management Program (CCMP).[3] In

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[3]In April 1977, the Secretary issued a revised draft environmental impact statement and announced his intention to approve the California program. *See American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 895 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Voluminous comments were received from a variety of sources, a substantial portion of which addressed the effects the proposed program would have on OCS oil leasing.

Interior's claims that, before approval of the CCMP, it did not anticipate application of the consistency requirements to the leasing stage and, therefore, would be unjustly surprised by such application now, DOI Pet. at 12-13, are belied by its comments on the proposed program. In its comments, the Department of the Interior, while conceding that California's program was exemplary, refused to accept the position that OCS leasing was subject to consistency review. CCMP, C.R. 3, Cal. Exh. L-18, Attachment J. at 20. Both WOGA and the American Petroleum Institute, as well as Exxon Corporation, also commented on the OCS implications of the CCMP. *See, e.g., id.* at 29, 33, 34, 37, 40.

so doing, he found that "the views of Federal agencies principally affected" by the program had been adequately considered.[4] Approval of the California Coastal Management Program at 26 (Nov. 7, 1977) (citing 16 U.S.C. § 1456(b)). He further found that:

> The management program provides for "adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature."

Id. at 18 (quoting 16 U.S.C. § 1455(c)(8)).

The American Petroleum Institute and the Western Oil and Gas Association (WOGA) sued to block approval of the CCMP. *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). These oil industry groups brought their challenge out of a purported concern that California would use its consistency powers under the CCMP to preclude oil and gas activities along the coast. 456 F.Supp. at 922. They attacked the CCMP for the alleged failure to consider adequately the views of affected federal agencies and the national interest involved in planning for and siting energy facilities. 456 F.Supp. at 920-922. However, the district court and the Ninth Circuit both rejected these claims, as well as others that the plaintiffs advanced, finding that the Program did provide for adequate consideration of the national interest and of affected federal agencies' views. 456 F.Supp. at 889, 922-927; 609 F.2d at 1306, 1313-1315.

Since the approval of the CCMP, California has maintained that the Department of the Interior's adjacent OCS lease sales are federal activities directly affecting the state's coastal zone for which consistency determinations must be

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[4]Interior's comments and Commerce's responses thereto are summarized in the CCMP, C.R. 3, Cal. Exh. L-18, Attachment J at 19-22.

performed.[5] The lease sale is the stage of the OCS oil and gas extraction process at which Interior indentifies specific areas of OCS lands to be offered for lease by competitive bidding and formulates lease stipulations to ensure the human and environmental safety of future operations on the lease sites. *See* DOI Pet. at 45a.

Several years of preparation and study by Interior precede each lease sale. As a part of these presale preparations, Interior and the oil industry expend considerable effort to determine the size and location of potential oil reserves. *See, e.g.*, Final Environmental Impact Statement on OCS Sale No. 53, C.R. 3, Cal. Exh. L-2 at 1-9 - 1-13. As the District Court held, the activities that occur during this period, including the call for nominations of tracts, the preparation and circulation of an environmental impact statement, and the publication of a final notice of sale, "define and establish the basic parameters for subsequent development and production." DOI Pet. at 45a. The tract selection at the lease stage determines "where the lessee can explore and produce oil and gas" and which areas will thus be exposed to the risk of oil spills. *Id.* The lease stipulations accompanying each lease sale are intended to insure protection for the coastal environment, as they influence the placement of drilling platforms and determine the standards for equipment and the training required of personnel. *Id.* at 45a-46a. The District Court concluded that "[L]easing sets in motion the entire chain of events which culminates in oil and gas development." DOI Pet. at 46a.

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[5]The National Oceanic and Atmosphereic Administration (NOAA), the Department of Commerce agency charged with administration of the CZMA, has promulgated regulations to ensure that the consistency requirements of § 307(c)(1) are carried out. 15 C.F.R. §§ 930.30-930.44. The mechanism through which a federal agency must attest that its proposed activity will be consistent to the maximum extent practicable with the state's management program is termed a consistency determination. 15 C.F.R. §§ 930.34, 930.37, 930.39.

While federal approval is required of individual lessees' plans prior to their undertaking exploratory and developmental drilling on any tracts they acquire, proposed plans for these activities on the various individual leases sold in a lease sale are not required to be submitted simultaneously, or in any particular geographic pattern. *See* 43 U.S.C. §§ 1340, 1351. In Lease Sale 53, there were 111 tracts, but the lessee's exploration and development plans are only required to focus on the activities that will occur on an individual tract. 30 C.F.R. §§ 250.34-1(a)(1), 250.34-2(a)(1). Even more importantly, the issues examined at the exploration and development stages are far narrower than those at the lease sale stage. The question at these stages is less whether drilling will proceed on the site than where and how it will proceed.[6] In addition, at this later stage of the OCS process, it is the lessee — not Interior — who must certify consistency. 16 U.S.C. § 1456(c)(3). Thus, consistency certification of OCS activities at the post-lease sale stages as required by § 307(c)(3) must necessarily be of a more piecemeal, localized nature than review at the lease sale stage, when the geographical scope of the sale and the generic lease stipulations are entirely within Interior's control.

Prior to the decisions of the courts below, NOAA, the General Counsel of the Department of Commerce, and the Department of Justice had all taken the position that lease

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[6]As the District Court recognized, the Secretary's authority to cancel leases once awarded is "limited," and "the cancellation procedure clearly is cumbersome and time consuming." Preliminary Injunction Opinion, Reporter's Transcript of Proceedings (May 27, 1981) at 100.

sales were subject to consistency review under § 307(c)(1).[7] Nonetheless, when Lease Sale 53, off the central California coast, was in the final stages of preparation for leasing, Interior issued a negative determination, stating that none of its pre-lease activities directly affected the coastal zone. Letter from Secretary Andrus to Michael Fischer, Executive Director, California Coastal Commission (October 22, 1980), C.R. 3, Cal. Exh. L-12 at 1. This refusal to conduct a consistency determination set the stage for the instant lawsuit, because California objected to the leasing of certain tracts on the basis of Interior's failure to comply with the CZMA's consistency requirements.

Thus, on April 29, 1981, California filed a complaint in the District Court for the Central District of California, seeking to enjoin the leasing of 29 of the 111 tracts proposed

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[7]Because of a disagreement over the applicability of § 307(c)(1) to the leasing stage of OCS development, in 1979 the Departments of the Interior and Commerce sought the opinion of the Department of Justice. The Department of Justice rejected Interior's position that its pre-lease sale activities were generically exempt from § 307(c)(1). Without deciding whether any particular lease sale directly affected a state's coastal zone, it agreed with the Commerce Department that these activities were subject to the consistency provisions of § 307(c)(1). Department of Justice Opinion, C.R. 3, Cal. Exh. L-15 at 13.

The opinions of the Departments of Justice and Commerce notwithstanding, Interior refused to conduct a consistency determination for the final notice of sale for Lease Sale 48 off southern California. 44 Fed. Reg. 44590 (July 30, 1979). California requested mediation by the Secretary of Commerce, as provided for in the CZMA, in order to resolve for future lease sales — particularly Sale 53 — the question of the applicability of § 307(c)(1) at the leasing stage. *See* 16 U.S.C. § 1456(h); 15 C.F.R. subpart 930(G). While the mediation was unsuccessful in producing any compromise, the mediator — the General Counsel of the Department of Commerce — concurred in California's view, calling the determination of the specific location in which to offer leases "the key activity that creates a right to develop those leases," and noting that consistency review at the exploration and development stages "will address specific and individual exploration and development plans and will provide only a piecemeal review of the leasing activities." Mediator's Memorandum for Secretary of Commerce (July 25, 1980), C.R. 3, Cal. Exh. L-7 at 2-3. He concluded that pre-lease activities are subject to the consistency provisions of § 307(c)(1). *Id.* at 4.

For NOAA's interpretation of § 307(c)(1), *see* 20, *infra*.

for leasing.[8] Several environmental organizations simultaneously filed a similar complaint. A number of California city and county governments intervened on the side of the state.

The plaintiffs sought to enjoin preliminarily the leasing of the disputed tracts on the basis of Interior's refusal to conduct a consistency determination.[9] The District Court found that California had demonstrated a probability of success on the merits of this claim and preliminarily enjoined the challenged portion of the lease sale.[10] On cross-motions for summary judgment, the District Court held that Lease Sale 53 directly affected the coastal zone and must be the subject of a consistency determination, and made permanent its injunction against the leasing of the disputed tracts.

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[8]These tracts contained only about 8% of the oil reserves projected for the sale area according to Interior's subagency, the United States Geological Survey. Letter from Secretary Watt to Governor Brown (May 1, 1981), C.R. 38, Fed. Exh. L-P.

[9]Plaintiffs did not seek a premature determination of inconsistency from the District Court but simply sought an order directing Interior to perform its consistency duties.

Plaintiffs also sought to enjoin leasing of the disputed tracts (plus three additional tracts) because of the Secretary of the Interior's rejection of the California governor's recommendations, under § 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1345, that these tracts be deleted from the sale. The courts below ruled against respondents on this claim.

Despite the attempts of Interior and WOGA to portray the protection of the sea otter as California's sole concern with the disputed tracts, DOI. Pet. at 5-6, WOGA Pet. at 4, the State's concerns included the negative effects of oil drilling on those tracts on many valuable biological resources, commercial and sports fisheries, ocean vessel traffic, port access, and coastal tourism and recreation. *See* Governor's Recommendation on Lease Sale 53, Comments of State Agencies on Lease Sale 53 and Comments of Local Governments on Lease Sale 53 (April 7, 1981), C.R. 3, Cal. Exh. L-1, Appendices at 20-21.

[10]Pursuant to the request of Interior and WOGA, the District Court allowed bids on the disputed tracts to be received and opened but prohibited the award of leases. Interior was to hold the money submitted with the bids pending resolution of the case. Approximately $220,000,000 was bid, and Interior is currently holding $44,000,000, which represents the 20% of the amount bid that Interior's regulations require to be submitted with the bids.

On appeal, the Ninth Circuit affirmed the District Court's ruling on § 307(c)(1). The Court of Appeals followed much the same course of reasoning as the District Court, analyzing the purpose of the CZMA, its legislative history, and NOAA's longstanding position on the meaning of "directly affecting." It concluded that the lease sale was a federal activity directly affecting the coastal zone because "decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production." DOI Pet. at 13a.

The petitions for writ of certiorari followed the entry of the judgment of the Ninth Circuit.[11]

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[11]Respondents have filed concurrently with this opposition a cross-petition for a writ of certiorari, seeking review of Part IV.E. of the Ninth Circuit's opinion, which discusses the meaning of the phrase "to the maximum extent practicable" as used in § 307(c)(1). Respondents believe that the issue petitioners present is not worthy of review by this Court and that Interior's and WOGA's petitions should be denied. If, however, this Court decides to grant their petitions, respondents wish to preserve their ability to present arguments challenging Part IV.E. The cross-petition has been filed out of an abundance of caution to insure their ability to raise those arguments.

REASONS FOR DENYING THE WRIT.

I.

THE LOWER COURTS' INTERPRETATION OF "DIRECTLY AFFECTING" AND THEIR AFFIRMATION OF CONSISTENCY REVIEW AT THE LEASING STAGE DO NOT WARRANT REVIEW BY THIS COURT.

Petitioners seek to invoke this Court's plenary review authority solely for the purpose of obtaining a narrow interpretation of a single phrase in § 307(c)(1) — "directly affecting." However, the lower courts' construction of this broad phrase does not depart from any "plain meaning" it has. That construction is supported by the purpose and legislative history of the CZMA; it was previously adopted by NOAA, the agency charged with administering the CZMA; it is in accord with the prior opinion of the Department of Justice; and it was recently reaffirmed by Congressional statements on the subject. Every court which has construed this language so far has reached the same conclusion as the courts below. Accordingly, the phrase "directly affecting" does not merit further review by this Court.

A. The Lower Courts Properly Construed "Directly Affecting."

At the outset, it is important to recognize that petitioners can claim no generic exemption from consistency review for OCS lease sales, either in the statutory language of § 307(c) or in its legislative history. Thus, petitioners "conceded on appeal that this section does apply at the lease sale stage." DOI Pet. at 12a.[12] Petitioners also do not dispute that oil and gas development pursuant to an OCS lease may "directly affect" the coastal zone of a state. At bottom,

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[12]In the argument before the Ninth Circuit, the attorney for the federal petitioners made clear this concession: "First of all we are accused of saying this provision, (c)(1), is inapplicable to leasing. We do not take that position. (c)(1) is applicable, and in this case, the Secretary did apply it." Transcript of Oral Argument (January 15, 1982) at 10.

petitioners argue that an OCS lease does not in itself "directly affect" a state's coastal zone because exploration and development are dependent upon intermediate federal approvals.[13]

It is surely no departure from any "plain meaning" of § 307(c)(1) to say that the "direct effects" of a lease are the intended uses of the property leased — in this case oil and gas development on the Outer Continental Shelf. The Ninth Circuit thus correctly viewed Lease Sale 53 as "the first link in a chain of events" which thereafter includes the approval of exploration and development plans, the oil and gas development and the consequent impacts upon a state's coastal zone. DOI Pet. at 13a. The fact that intermediate approvals are required for the subsequent *private development* does not make the effects of the *federal activity*, the lease, any less "direct."

This straightforward application of § 307(c)(1) to an OCS lease sale does not threaten to subject every other "federal activity" — however "indirect" — to consistency review, as petitioners imply. *See, e.g.*, DOI Pet. at 20-22. Thus, for example, if a federal agency were to impose a restriction on foreign oil imports, one might well hypothesize "effects" on a state's coastal zone from the resulting inducement for additional domestic OCS oil and gas production. However, that kind of effect is one which clearly operates "indirectly," or, to use petitioners' terms, "mediately, remotely or collaterally." *Id.* at 10.

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[13]Throughout this litigation, petitioners have adopted inconsistent positions on these questions. For example, before this Court, they argue that § 307(c)(1) does *not* apply to an OCS lease sale. *See, e.g.*, DOI Pet. at 8, 10, 11, 19. They also suggest that application of consistency to lease sales should not be done on a case-by-case basis, but imply that they are generically exempt. *Id.* at 19-20. Their argument in the Ninth Circuit was just the contrary. *See* note 12, *supra*. In the trial court, they asserted that the determination of whether a lease sale "directly affects" a state's coastal zone has to be made on a case-by-case basis. Reporter's Transcript of Proceedings (July 17, 1981) at 186.

In place of this common sense view, petitioners have relied principally on semantic gamesmanship. In the District Court, they offered a variety of definitions of the word "direct" from a dictionary, but ultimately the "plain meaning" they assigned the term was a definition of their own making. *Id.* at 58a-59a. In particular, they asked the District Court to incorporate into § 307(c)(1) the tort concepts of "proximate" and "intervening cause" to determine when federal activities are subject to consistency review. DOI Pet. at 59a. Similarly, in this Court, they assert that "direct effects" are those which occur "proximately" or "without any intervening agency or instrumentality of a determining influence." *Id.* at 10.

More than enough judicial attention has already been devoted to these arguments. As the District Court observed, the tort concepts of "proximate" and "intervening cause" were created by the courts to *limit* tort liability and have no relevance to a statute designed to *foster* intergovernmental coordination in the management of coastal resources. *Id.* at 59a. Moreover, even assuming these tort concepts had been incorporated into the statute by Congress, the District Court properly concluded that their literal application would not alter its decision. *Id.* at 60a-61a.[14]

As applied to OCS leasing in practice, petitioners' definitions of "directly affecting" are highly artificial and

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[14]For example, the District Court noted that *Black's Law Dictionary* (5th Ed. 1979) defines an "intervening cause" as one which "turns aside the natural sequence of events, . . . produces a result which would not otherwise have followed and which could not have been reasonably anticipated . . . and destroys the causal connection" between the act and the effect. DOI Pet. at 60a n.16. Clearly, the intermediate federal approval required for exploration or development under an OCS lease cannot be considered an "intervening cause" in any of these respects.

Petitioners also cite the definitions of "direct" and "indirect" effects in the Council on Environmental Quality's regulations implementing the National Environmental Policy Act. *Id.* at 10 n.11. However, it is ironic that petitioners rely upon a definition adopted by an agency without any responsibility for interpreting the CZMA, and at the same time ignore the definition adopted by NOAA, the one agency designated by Congress with that responsibility. See discussion *infra* at 20.

grossly distort the actual leasing process. For example, by virtue of the intermediate approvals for exploration and development required by Congress in the OCSLA, 43 U.S.C. §§ 1331 *et seq.*, the Department of Interior asserts that "a lease does not authorize the lessee to explore, develop or produce oil or gas." DOI Pet. at 15. However, Congress itself understood the practical significance of such a lease to be just the opposite. In OCSLA, it defined a "lease" as "any form of authorization which . . . *authorizes exploration for, and development and production of, minerals.*" 43 U.S.C. § 1331(c) (emphasis added).

As the Ninth Circuit observed, "decisions made at the lease sale stage in this case established the basic scope and charter for subsequent development and production." DOI Pet. at 13a.[15] If, as petitioners assert, *id.* at 21 n.21, there were so little "identifiable" or "clear relationship" between an OCS lease and actual oil and gas development, one would wonder why the members of petitioner WOGA are willing to post huge sums of money in order to secure these leases.[16]

There is nothing at all remarkable in the lower courts' rejection of petitioners' "narrow definition of 'directly affecting.' " *Id.* at 13a. The lower courts did not renounce the plain meaning doctrine as a "subterfuge," *id.* at 10, but rather rejected petitioners' misuse of that doctrine. *See, e.g.*, DOI Pet. at 58a-61a. Nor can petitioners seriously maintain that the lower courts stepped beyond the proper boundaries

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[15]As discussed *supra* at 5-6, the selection or deletion of tracts and the adoption of lease stipulations profoundly affect, *inter alia*, "whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic and the siting of on-shore construction." DOI Pet. at 13a. Moreover, the lease sale stage is the only meaningful opportunity for analysis of the cumulative effects of development on the tracts leased, as discussed *infra* at 17-18.

[16]In fact, on a single tract in Lease Sale 53, not disputed in this litigation, Chevron Oil Company U.S.A., Inc., and Phillips Petroleum Corporation bid $333,600,000. *Los Angeles Times*, April 29, 1981, Part I at 1.

of statutory construction in this case by extensively reviewing the legislative history and purpose of the provision in question, *see, e.g.*, WOGA Pet. at 10-11 — particularly since the statutory term "directly affecting" is not itself defined in the Act.[17] In sum, the lower courts' interpretation of the statutory language raises no novel issues warranting this Court's review.

B. There Is Nothing Unusual in Requiring an Environmental Review Under the Consistency Provision at This Important Stage of the OCS Decisionmaking Process.

Petitioners also assert that the lower courts failed to take account of what they characterize as a "unique" federal regime of "phased decisionmaking" in which "the initial determination to authorize oil and gas activity on a tract in the OCS, by offering it at a lease sale, can be modified or reversed" at later stages. DOI Pet. at 14. However, this type of "phased decisionmaking" is scarcely "unique" in federal statutory regimes.[18] The courts have typically rejected agency arguments of the kind petitioners make here that the environmental effects of such "initial determinations" need not be assessed because they are too "speculative, remote and subject to further . . . review" at later stages. *Id.* at 9.[19] Rather, such assessments are required to

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[17]The policy considerations behind the statute, the purpose it was intended to achieve and the legislative history are obviously important resources in determining legislative intent. *Blue Chip Stamp v. Manner Drugs*, 421 U.S. 723, 737 (1973).

[18]For example, the Mineral Lands Leasing Act, 30 U.S.C. §§ 181 *et seq.*, requires Interior to consider the environmental effects of issuance of a coal lease, 30 U.S.C. § 201(c)(3)(C), despite the fact that mining is dependent on Interior's later environmental review and approval of an "operation and reclamation plan" submitted by the lessee. 30 U.S.C. § 207.

[19]*See, e.g., Scientists Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1086 (D.C. Cir. 1973) (holding that the policy favoring early environmental review in NEPA outweighed the AEC's arguments that the project was of a "remote and speculative nature" and "remains uncrystallized in form and undetermined in application.")

be conducted at "the earliest possible time."[20] In holding that Interior's "initial determination to authorize oil and gas activity" required a consistency determination, the decisions of the lower courts follow these fundamental principles.[21] In this respect, there is nothing unusual about the decisions below which would warrant this Court's plenary review.

Indeed, these same principles have previously been held applicable to the phased decisionmaking procedures established for OCS development. The Court of Appeals for the District of Columbia Circuit described these procedures as "pyramidic in structure, proceeding from broad-based planning to increasingly narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981). In that case, the court specifically rejected the same arguments as are advanced by petitioners here — that they could defer review of "highly variable or speculative matters which are best addressed at a specific future time." 668 F.2d at 1305. The court held that decisions in connection with the Interior's preparation of a five-year leasing plan must be made on the basis of the information available at the initial stages of the process, rather than being deferred to later stages:

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[20]*Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (quoting CEQ regulations with approval).

[21]Petitioners purport to rely on cases decided under NEPA to excuse their failure in Lease Sale 53 to make a consistency determination under the CZMA. DOI Pet. at 15 n.16. However, NEPA is a completely distinct statute which does not alter consistency obligations under the CZMA. Petitioners concede as much when they recognize that NEPA imposes only "procedural" requirements and "does not prescribe the substantive content of federal decisions" as the CZMA does. *Id.* at 21-22. Thus, as discussed *infra* at 18-19, it is all the more important that the *federal decisions* at the lease sale stage be subjected to consistency review. Moreover, the sole issue that petitioners seek to place before this Court is whether the threshold requirement for a consistency determination is met at the lease sale stage. While the NEPA cases cited by petitioners established certain parameters for Interior's environmental review of an OCS lease, they also confirmed the threshold requirement that such a review be conducted at the leasing stage. *See also*, cases cited in notes 19, 20, *supra*, and notes 24, 25, *infra*.

> Although the continual collection and assimilation of pertinent information must of course continue throughout the OCS process, and although the speculative nature of any information may well affect the weight the Secretary attaches thereto in drawing up the leasing program, § 18(a)(2) [of OCSLA] nonetheless requires the Secretary at the program stage to consider each factor listed therein on the basis of the best information available, and to base the leasing information upon the information thereby obtained." *Id.* at 1307.[22]

The lower courts in the instant case thus applied principles that have been uniformly upheld in construing other environmental review statutes, as well as the OCS leasing process itself. The opinions below carefully analyzed the "pyramidic" structure of the OCS process and concluded that Congress' purpose in requiring consistency review of federal activities in § 307(c)(1) of the CZMA could be fulfilled only if consistency is determined at the lease sale stage.

The lease sale is the only stage in the OCS process at which *federal activities* are involved within the meaning of § 307(c)(1). The lease sale is the federally-initiated action which "establish[es] the basic scope and charter" for all subsequent exploration and development of the area. DOI Pet. at 13a.[23] Once the lease sale occurs, the initiative passes

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[22]Petitioner WOGA implies that the District of Columbia Circuit held in that case that consistency review was not required with respect to Lease Sale 53 but could be deferred to later stages. WOGA Pet. at 15 n.16. However, the issue of consistency review at the lease sale stage was not before the District of Columbia Circuit, and it did not so hold.

[23]Interior's decision to offer specific tracts (and not others) for leasing sets the basic parameters for the location of oil production and transportation on the OCS. For this reason, tract selection also determines broadly which coastal areas may be needed for petroleum processing and transportation; whether the mode of transportation will be pipelines or tankers (with their differing risks and impacts); where the risks of vessel collisions, well blowouts and other accidents will be increased; where OCS structures such as platforms may be built; and where other heavy industrial activities associated with OCS development are likely to occur. *See generally* DOI Pet. at 45a-46a.

to industry. The later review is confined to plans for specific tracts submitted by each lessee, in the order and time of its own choosing, and it is the applicant — not the Secretary — who must certify consistency at that stage.

From a practical standpoint, the lease sale is thus the only stage at which certain matters can be decided effectively by the federal government. For example, it is only at that stage that the cumulative impacts of the oil and gas development which may occur under the leasing can be properly evaluated.[24] Otherwise, review is limited to specific exploration and production plans which may be submitted at different times for different tracts. As the District of Columbia Circuit observed in *California v. Watt, supra*, the Secretary has never explained how the larger decisions can be made "in the context of a decision on the placement of a particular exploratory well." 668 F.2d at 1306.[25]

The lease sale is fundamentally a "subdivision" of the OCS into tracts. Thus, the Ninth Circuit correctly discerned that "critical decisions" are made at that stage:

> Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed

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[24]*See Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976) (". . . when several proposals for coal-related actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.")

[25]*See also Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975) (holding that an EIS on a mining plan for 770 acres did not satisfy DOI's obligation to prepare a comprehensive EIS on the impact of the precedent leases of 30,000 acres of land).

to danger, the flow of vessel traffic and the siting of on-shore construction. DOI Pet. at 13a.[26]

The "direct effects" upon a state's coastal zone from these federal decisions are obviously matters of concern to the state. The Ninth Circuit determined that the intergovernmental coordination encouraged by the CZMA would be severely hampered unless the state is "permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone." *Id.* at 14a.[27]

If petitioners' view were adopted, the "federal activity" in the OCS process would never be subjected to a review for consistency. Petitioners' argument fails to recognize the important decisions made at the lease sale stage and runs counter to the case law requiring environmental review at the earliest stages of such a phased decisionmaking process.

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[26]Petitioners assert that there is insufficient information at the lease sale stage to address the sort of concerns which the state has raised regarding Lease Sale 53. DOI Pet. at 19. Nevertheless, in Lease Sale 48, which preceded Lease Sale 53, Interior deleted 24 tracts in the Santa Barbara Channel *at the lease sale stage* expressly for a purpose similar to one of the state's concerns in Lease Sale 53 — "[t]he objective of protecting the valuable seabird and marine mammal rookeries" in that part of the sale area. Letter from Secretary Andrus to Governor Brown (June 29, 1979). In addition, Interior has previously conceded that the impostion of lease stipulations can substantially reduce adverse coastal impacts which would otherwise occur. Solicitor's Opinion (October 1979), C.R. 3, Cal. Exh. L-11, at 8; *Alaska v. Andrus*, 580 F.2d 465, 471, 478 (D.C. Cir. 1978).

[27]If consistency review were deferred, as petitioners urge, until the oil industry's submission of exploration and development plans on specific tracts leased, then the affected state and local governments would be limited to reviewing such plans under CZMA § 307(c)(3) on a tract-by-tract basis and would necessarily be deprived of the opportunity to have the provisions of the management program applied to the entire sale. Evidence presented by respondents in the District Court, for example, showed that the exploration and development plans in the Santa Barbara Channel were submitted for the state's consistency review for random geographic areas over a 2½ year period. Affidavit of Mari Gottdiener, C.R. 86 at 63. The broader concerns of the state — determination of which areas should be protected from the risk of oil spills, which modes of oil transportation should be employed and where on-shore construction should sensibly be located — are impossible to address on this piecemeal basis.

Thus, the lower courts properly concluded that the lease sale stage presented the only occasion for the important comprehensive review of the "federal activity" and properly rejected petitioners' notion that consistency review must be deferred until more information is available at later stages of the OCS process.

C. The Ninth Circuit's Decision Is in Accord with the Decisions of Other Courts on This Question, the Prior Interpretations of NOAA and the Department of Justice and the Express Intent of Congress.

The instant petitions present no occasion for this Court to resolve any conflict in decisions of the Courts of Appeals, because there is no such conflict. Every judge who has examined this issue so far has reached the same result.[28] Not surprisingly, in the wake of these decisions the Department of the Interior has itself determined to prepare consistency determinations nationwide upon all subsequent lease sales and has in some instances already prepared such determinations. DOI Pet. at 19 n.18.

Moreover, the decisions for which review is sought in this Court follow the past interpretations of the single agency charged by Congress with authority to construe the terms of the Coastal Zone Management Act, the National Oceanic and Atmospheric Administration. Thus, in its final 1979 regulations, NOAA expressly stated that "Section 307(c)(1) of the CZMA applies to Interior's OCS pre-lease sale activities directly affecting the coastal zone." 44 Fed. Reg. 37142.[29]

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[28] *See Kean v. Watt*, No. 82-2420 (D.N.J., Oct. 8, 1982) (Reoffering Sale 2); *California v. Watt*, 17 ERC 1711 (C.D. Cal. June 9, 1982) (Lease Sale 68).

[29] That position was restated by NOAA on subsequent occasions, until after the instant suit was filed. At that time, NOAA proposed to revise its regulations to adopt the view previously espoused by Interior that the provision did not apply to lease sale activities. As discussed *infra* at 25, after Congressional resolutions objecting to the proposed revision were introduced, NOAA withdrew it.

The Department of Justice itself rendered essentially the same opinion at an earlier stage. That 1979 opinion rejected the contentions of Interior that in 1976 Congress expressed its intent to exempt leases from § 307(c)(1), as well as Interior's argument that application of consistency to lease sales is incompatible with § 19 of OCSLA. *See* Department of Justice Opinion, C.R. 3, Cal. Exh. L-15. The opinion expressly concludes that the "pre-leasing activities of the Secretary of Interior are subject to the conformity requirements of Section 307(c)(1)." *Id.* at 13.

Most importantly, the interpretation of "directly affecting" by the lower courts is supported by the legislative history of the CZMA and of the OCSLA, as well as express recent pronouncements by Congress, as discussed in the next section. Thus, the question which petitioners seek to place before this Court has already been answered in the same way not only by every court which has so far considered the question but also by the agency charged with construing the statute, by the Department of Justice in prior opinions and by Congress. This case accordingly presents no occasion worthy of this Court's grant of plenary review.

II.

CONGRESS HAS DETERMINED THAT OCS LEASE SALES MUST BE CONSISTENT WITH APPROVED COASTAL ZONE MANAGEMENT PROGRAMS PURSUANT TO § 307(c)(1).

Petitioners argue that the decisions of the lower courts will disrupt a carefully ordered Congressional scheme for expedited OCS development and will imperil efforts to resolve the country's energy problems. DOI Pet. at 18-21; WOGA Pet. at 15-18. However, Congress has recognized the conflicting interests in the coastal zone and has recently reaffirmed its desire that those conflicts be resolved in precisely the manner upheld by the lower courts. If petitioners believe that the application of consistency review to OCS lease sales strikes an improper balance between state and

federal interests in the coastal zone and development in adjoining OCS areas, their remedy lies in seeking an alteration of Congressional policy and not in further review of this matter by this Court.

Petitioners would have this Court believe that Congress has determined that the "national interest" is best served solely by expediting OCS development — regardless of its impact on proper management of the coastal zone. However, the first premise of the CZMA is the Congressional finding that "[t]here is a national interest in the effective management, beneficial use, protection and development of the coastal zone." 16 U.S.C. § 1451(a). Congress recognized that energy demands on the OCS "are placing stress on these areas and creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters." 16 U.S.C. § 1452(f). Congress also recognized that conflicts between federal agencies and states would arise.

Congress resolved these conflicts in two fashions. First, it required that states seeking federal approval of coastal management programs provide in the program for adequate consideration of the "national interest" in both the protection of the coastal environment and the siting of energy facilities. *See, e.g.*, 16 U.S.C. §§ 1452(2)(B), (C); 1453(6); 1454(b)(8); 1455(c)(8). Moreover, Congress required that state coastal programs not be approved until the views of all affected federal agencies, including Interior, have been considered.

Second, Congress established a mechanism for resolving conflicts between federal agencies and states with approved coastal programs by directing that the activities of those agencies be consistent to the maximum extent practicable with the approved programs. 16 U.S.C. § 1456(c)(1). Congress thus made clear that states with approved programs — *i.e.*, programs which adequately consider the national interest as well as the views of federal agencies — would

have, through the consistency mechanism, an important voice in federal activities affecting the coastal zone. Moreover, in the OCSLA, Congress provided that the coastal states would be given a greater role in the OCS decision-making process, without limiting any of the prerogatives granted those states in the CZMA. Thus, it is Congress that has established the relative roles of the states and Interior, and the lower courts have done no more than recognize the balance established by Congress.

Petitioners, however, are asking this Court to set a different balance than that established by Congress, despite the fact that the most recent pronouncements of Congress on § 307(c)(1) are completely contrary to their position. In effect, petitioners seek to have this Court judicially amend § 307(c)(1).

A. Congress Has Directed That a Consistency Determination Be Prepared at the Lease Sale Stage.

Petitioners rely upon selected excerpts of the legislative history of the OCSLA and the CZMA to argue that Congress did not intend OCS lease sales to be subject to consistency review. DOI Pet. at 14-18; WOGA Pet. at 15-18. However, this argument is flatly contradicted by the legislative history of both statutes.

In the legislative history to § 19 of OCSLA, 43 U.S.C. §1345, the section upon which petitioners rely, the House Report attempted to clarify the roles of Interior and the states in light of the consistency requirements of the CZMA. The House Report states as follows:

> The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 *et seq.*), certain OCS activities *including lease sales* and approval of development and production plans must comply with "consistency" requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Title IV and V of the 1977 Amend-

> ments, nothing in this act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency if a State has an approved Coastal Zone Management Plan.

H. Rep. No. 590, 95th Cong., 1st Sess. 153 n.52 (1977) (emphasis added). In fact, Congress formalized this intent in the savings clause of the OCSLA, 43 U.S.C. § 1866(a), which specifically provides that "nothing in that Act shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972. . . ."

In short, the OCSLA and its legislative history explicitly confirm that the consistency requirements of the CZMA apply to OCS lease sales and that the OCSLA was not intended to change that result. This is exactly the point recognized by the lower courts. DOI Pet. at 18a-19a, 51a-54a.[30]

These statements of Congress regarding the OCSLA are in full accord with Congressional statements on the CZMA. Thus, the Senate Report regarding the 1980 amendments to the CZMA states:

> The Department of Interior's activities which *preceded lease sales* were to remain subject to the requirements of section 307(c)(1). As a result, intergovernment coordination for purposes of OCS development commences at the *earliest practicable time* in the opinion of the Committee, as the Department of Interior sets in motion a series of events which has consequences in the coastal zone. Coordination must *continue* during the critical exploration, development and production stages.

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[30] The Department of Justice, in its 1979 opinion, expressly relied upon the savings clause and the legislative history of § 19 to reject Interior's position. *See* Department of Justice Opinion, C.R. 3, Cal. Exh. L-15 at 11-13.

S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) (emphasis added). The 1980 House Report also noted specifically the "Federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." H. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980).[31]

Given these clear statements from Congress, NOAA, the agency charged with administering the CZMA, historically took the position that federal OCS lease sale decisions required a consistency determination. It is extremely significant that when NOAA in 1981 suddenly sought to reverse this long-held position, and to exempt OCS lease sales from the requirements of § 307(c)(1), resolutions of disapproval were immediately introduced in both Houses of Congress. NOAA promptly withdrew its new regulation, citing the negative reaction from Congress as well as the coastal states. 46 Fed. Reg. 50976 (1981); *see also* DOI Pet. 17a-18a, 57a-58a. Petitioners, however, have ignored this most recent manifestation of Congressional intent as well as the relevant legislative history of the CZMA.[32]

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[31]These unequivocal statements from Congress in 1980 represent no departure from its earlier views. For example, the Senate Report accompanying the 1976 amendments to the CZMA noted that past difficulties arising from the lack of coordination between coastal states and federal agencies prior to OCS lease sale decisions could be resolved by "[f]ull implementation of the Coastal Zone Managment Act of 1972. . . ." S. Rep. No. 277, 94th Cong., 2d Sess. 3 (1975). Moreover, the Senate Report again concluded, with specific reference to federal OCS activities, that ". . . under the act as it presently exists, . . . if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply." *Id.* at 37.

[32]Lacking any legislative history on § 307(c)(1) to support their position, petitioners rely on the legislative history of another section, § 307(c)(3). While § 307(c)(1) addresses federal agency activities which directly affect the coastal zone, § 307(c)(3) applies only to *applicants* for federal licenses or permits. 16 U.S.C. § 1456(c)(3). Petitioners suggest that since the word "lease" was not added to § 307(c)(3) in 1976, federal leasing activities are somehow excluded from consistency coverage under § 307(c)(1). DOI Pet. at 16-18; WOGA Pet. at 15-17. However, as discussed *supra* at notes 12, 13, this assertion completely contradicts petitioners' concession that § 307(c)(1) does apply to federal OCS lease sale decisions. Moreover, as the trial court found, this ar-

B. Pursuant to Congress' Intended Meaning of "Directly Affecting," Consistency Review Necessarily Applies at the Lease Sale Stage.

The meaning which Congress attached to the phrase "directly affecting" clearly requires that the consistency determination of § 307(c)(1) be conducted at the lease sale stage, and it is the Congressional understanding of this phrase that the lower courts applied to Lease Sale 53.

The 1971 Senate Report explained the intent of Congress concerning the federal activities which were to be subject to § 307(c)(1):

> It is intended that any lands or waters under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering federal agency determines them to have a *functional interrelationship from an economic, social or geographic standpoint with land and waters within the coastal estuarine zone*, should be administered consistent with approved state management programs.

S. Rep. No. 526, 92nd Cong., 1st Sess. 30 (1971) (emphasis added).[33]

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gument must be rejected as an impermissible repeal by implication. DOI Pet. at 48a. The most that can be said of the history of § 307(c)(3) is that the *applicant* for a federal OCS lease does not have to engage in a consistency determination at the lease sale stage. Congress has specifically stated that the 1976 amendments to § 307(c)(3) "did not alter *federal agency* responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." H. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980) (emphasis added); *see also* S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

[33]Early versions of § 307(c)(1) applied only to federal activities "in" the coastal zone. In 1972, the Conference Committee broadened the phrase considerably by substituting the "directly affecting" language now found in the Act. Petitioners assert that Congress intended to retain the original limitation of § 307(c)(1) to federal activities "in" the coastal zone and substituted the phrase "directly affecting" to further limit the scope of § 307(c)(1). DOI Pet. at 11 n.13. However, the trial court correctly found that this change was intended to expand the scope of the provision. DOI Pet. at 46a. This conclusion is unavoidable since the language is clearly of broader import than the language originally proposed. Moreover, contrary to petitioners' assertion, the Senate Report specifically noted that the federal activities covered by § 307(c)(1) included ". . . activities *in or out of the coastal zone* which affect that area." S. Rep. No. 277, 94th Cong., 1s Sess. 36-37 (1975) (emphasis added).

In 1980, Congress reauthorized the CZMA. 94 Stat. 2060 (1980). Congress amended certain sections of the Act but did not alter any of the § 307 consistency provisions. However, at that time, Congress also recognized the uncertainty that had arisen concerning the interpretation of the threshold test of § 307(c)(1). H. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980). To resolve any uncertainty, the House Report restated that 1971 formulation of the "functional interrelationship" test, quoted above, and added this further clarification:

> Thus, when a federal agency initiates a series of events of coastal management consequences, the intergovernment coordination provisions of the federal consistency requirements should apply.

Id. at 34. *See also* S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Congress has thus made its intention perfectly clear. The threshold test of § 307(c)(1), "directly affecting," is satisfied whenever a federal agency initiates a series of events of coastal management consequence. H. Rep. No. 1012, *supra*, at 34. As NOAA noted, this test is interchangeable with the "functional interrelationship" language which was derived from the 1971 Congressional deliberations. *See* 44 Fed. Reg. 37143 (1979).

The lower courts did no more than give effect to these Congressional tests.[34] As the Ninth Circuit stated, "Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and

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[34]Lacking support in the legislative history for their definition, petitioners are forced to argue that the 1980 legislative history is entitled to no weight. DOI Pet. at 12 n.14; WOGA Pet. at 18 - 19. Petitioners have ignored the fact that the "functional interrelationship" test is drawn from the 1971 legislative history. Moreover, the courts below properly concluded that the 1980 legislative history is entitled to substantial weight. DOI Pet. at 15a - 16a, 50a - 51a; *see also Andrus v. Shell Oil Co.*, 446 U.S. 657, 667 n.8 (1980).

development of oil and gas on the individual tracts leased." DOI Pet. at 13a. Similarly, the District Court held:

> Only a definition which provides for the application of § 307(c)(1) at the decision-making stage of the leasing process will effectuate the congressional intent and give proper meaning and focus to the Act. Clearly, *the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone*. Any other interpretation would thwart the purpose of the Act.

Id. at 51a (emphasis added).

Thus, Congress has repeatedly addressed — in unequivocal terms — the very question which petitioners seek to place before this Court. The decisions of the lower courts merely follow the Congressional intent underlying § 307(c)(1). However much petitioners may believe that the national interest will be served by a reversal of these decisions, the appropriate forum for consideration of such a reversal is Congress, not this Court.

III.

THE DECISIONS BELOW WILL NOT DISRUPT OCS LEASING OR OTHER FEDERAL ACTIVITIES.

Petitioners argue that the decisions of the lower courts portend delay and litigation over future OCS lease sales, as well as disruption of other federal activities. DOI Pet. at 18-22. However, what petitioners ignore is that the lower courts have merely followed the will of Congress that the CZMA apply in this fashion to OCS activities.

Moreover, adherence to the decisions below has caused no disruption of OCS activities. Consistency determinations are now being prepared by Interior on all OCS lease sales without causing any apparent undue burdens. Indeed, the American Petroleum Institute has recently informed the Court of Appeals for the District of Columbia Circuit that

the Ninth Circuit's ruling has resulted in only "insignificant" revisions in the scheduling of several lease sales.[35]

In fact it is certainly arguable that there will be *less* delay and disruption of OCS leasing if state management program are applied in § 307(c)(1) consistency review at the lease sale stage, under the decisions of the lower courts, than if the states are relegated to review of individual exploration and development plans under § 307(c)(3) at a later stage of the process. As the District Court found:

> If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual leases as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decisionmaking envisioned by the draftsmen of the CZMA.

DOI Pet. at 46a.

NOAA has similarly observed that "implementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environment and socio-economic impacts, *thereby reducing conflicts with affected states and avoiding delay in the exploitation of offshore energy resources*." 44 Fed. Reg. 37142 (1979) (emphasis added). Thus, application of § 307(c)(1) at the lease sale stage may well lead to early resolution of problems rather than forcing resolution on a tract-by-tract basis under § 307(c)(3).[36]

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[35] "Supplemental Memorandum of Intervenors in Response to Court Order dated January 28, 1983," filed February 7, 1983, in *State of California v. Watt*, D.C. Cir. No. 80-1894, *et al.*

[36] Section 307(c)(3) provides that an applicant for a federal license or permit to conduct an activity affecting land or water uses in the coastal zone shall provide a certification that the proposed activity complies with the approved coastal program and will be conducted in a manner consistent with the program. The federal agency may not issue the permit or license until the state concurs in the consistency certification or unless the Secretary of Commerce finds the activity to be consistent with the state program or otherwise in the interest of national security. 16 U.S.C. § 1456(c)(3).

Similarly, the possibility of a state using § 307(c)(1) to veto OCS development is simply not supported. First, it is Interior and not the state that issues a determination of whether the lease sale can be conducted consistent with the state's coastal management program. 15 C.F.R. § 930.34. Second, consistency is required to be determined only for state programs approved by NOAA. Under the CZMA, NOAA cannot approve a state program unless the program gives adequate consideration to the national interest in both coastal protection and energy development and to "the views of federal agencies principally affected by such programs." 16 U.S.C. §§ 1452(2)(A), (B); 1455(c)(8), 1456(b). In fact, the California Coastal Management Program has been specifically held to satisfy those requirements. *American Petroleum Institute v. Knecht*, 609 F.2d 1036, 1315 (9th Cir. 1979).

Finally, petitioners allege that the lower courts' reading of "directly affecting" will disrupt a "wide range of federal activities." DOI Pet. at 20-21. Petitioners fail to note that the lower courts' decisions were consistent with NOAA's longstanding view that "directly affecting" must be liberally construed. Despite NOAA's interpretation, which has been relied upon by federal agencies and coastal states for a number of years, the federal government has not been thrown into chaos, contrary to petitioners' contentions.[37]

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[37] In fact, petitioners can provide no example of such disruption except for a single hypothetical involving coal leasing in Wyoming. DOI Pet. at 20 n.21. However, there is nothing in the opinions below which supports the application of § 307(c)(1) to such a farfetched hypothetical. Nor do petitioners provide any evidence that any coastal state has ever asserted such a position. Other than this single example, petitioners never explain how federal activities will be thrown into "chaos." It is obvious that OCS leasing immediately adjacent to a state's coastal zone, with recognized impacts flowing from such leasing, has a "clear" and "identifiable" relationship to the coastal zone, in contrast to a coal lease in Wyoming where there exists merely "the *possibility* that a lessee *might* use a *proposed* pipeline to transport coal to a gulf coast port." DOI Pet. at 20 n.21 (emphasis added).

Conclusion.

The petitions for a writ of certiorari of the Department of Interior and the Western Oil and Gas Association should be denied.

Respectfully submitted,

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